

No. 78-946

Supreme Court, U. S.

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In the
Supreme Court of the United States

OCTOBER TERM, 1978

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, ET AL.,

Petitioners,

v.

BURLINGTON NORTHERN INC., ET AL.,

Respondents.

**MEMORANDUM OF RESPONDENT BURLINGTON
NORTHERN INC. IN RESPONSE TO PETITION
FOR WRIT OF CERTIORARI**

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The Solicitor General, on behalf of the Equal Employment Opportunity Commission, has petitioned for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, reported at 582 F.2d 1097.

The basis for the Petition is the alleged direct conflict between the decision below and that of the United States Court of Appeals for the Fifth Circuit in *H. Kessler & Co. v. Equal Employment Opportunity Commission*, 472 F.2d 1147, *cert. denied*, 412 U.S. 939 (1973), with respect to the authority of the EEOC to disclose to charging parties information obtained by EEOC during the course of an

investigation of an employer's employment practices, in light of the prohibition contained in section 709(e) of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e-8(e)). EEOC also seeks review of the decision below in order to clarify its authority under section 709(e) to disclose to those charging parties who have filed suit against an employer not only on their own behalf but as class representatives information that does not relate directly to their individual claims but is relevant to the claims of the class.

Burlington Northern Inc. does not oppose EEOC's Petition. Indeed, BN submits that this is an appropriate and an important case for review by this Court for the reasons set forth in the Petition. There may be a real and direct conflict between the decisions of the Seventh and Fifth Circuits with respect to the meaning of section 709(e)'s prohibition. Moreover, the issue of the scope of disclosure that may be allowed when a charging party brings a Title VII action as a class action, and the inherently intertwined fundamental issue of the permissibility of such a class action during the pendency of an EEOC commissioner's charge investigation, are of such substantial public importance as to warrant review by this Court.*

* Since the filing of the Petition, a system-wide class of black current and former BN employees and applicants for employment has been certified in *McBride v. Burlington Northern Inc.*, No. 78 C 269 (N.D. Ill.). The plaintiffs in *McBride* were among those requesting disclosure by EEOC of its commissioner's charge investigation files. BN has filed a motion with the Judicial Panel on Multi-district Litigation to transfer all other pending cases to the Northern District of Illinois pursuant to 28 U.S.C. §1404 in light of the certification in *McBride*. *In re Burlington Northern Inc. Employment Practices Litigation*, No. 374 (JPML).

CONCLUSION

For the reasons set forth herein and in the Petition for a Writ of Certiorari filed by the Solicitor General on behalf of the Equal Employment Opportunity Commission, Respondent Burlington Northern Inc. requests that this Court grant the Petition and issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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